Supreme Court, U.S.
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No. 03-806

**In the Supreme Court of the United States**

ROBERT MARIANA, MICHAEL J. MCFADDEN, KAREN M. MORAN, AND EDWARD M. NANKERVIS,
*Petitioners*

*v.*

GERALD J. PAPPERT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; AND GREGORY J. FAJT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA,
*Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

# SUPPLEMENTAL BRIEF OF RESPONDENTS

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DATE: January 23, 2004

## ARGUMENT

Respondents file this supplemental brief to address *Freedom Holdings, Inc. v. Spitzer*, No. 02-7492, 2004 WL 26498 (2d Cir., January 6, 2004), a decision filed the day after they filed their brief in opposition to the petition for certiorari. Petitioners have addressed *Freedom Holdings* in their own supplemental brief and have described it as "in direct and complete conflict" with the Court of Appeals' decision in the case. Petitioners are wrong. There is no direct conflict, and *Freedom Holdings* is distinguishable on the facts.

In this case, the petitioners brought a direct challenge to the terms of the Master Settlement Agreement (MSA) by which the tobacco litigation brought by 46 states against tobacco manufacturers was settled. Petitioners named as defendants Pennsylvania's Secretary of Revenue and Attorney General, asking that certain provisions of the MSA be invalidated. This followed an earlier lawsuit in which similar claims were made against tobacco companies who were signatories to the MSA, but the Court of Appeals concluded in that case that the companies were shielded from antitrust liability under the *Noerr-Pennington* Doctrine. *See A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2002), *cert. denied*, 534 U.S.. 1081 (2002). The Court of Appeals in this case held, as it had in *Bedell*, that the act of negotiating the MSA was petitioning activity — directed to the court — which was entitled to *Noerr-Pennington* protection, and the state officials involved were entitled to the same immunity it had earlier accorded the private participants. "If the government officials have *Noerr-Pennington* immunity for entering into the MSA, that immunity must extend to complying with

and enforcing its provisions," the Court of Appeals said. Pet. App. 17a-18a.

*Freedom Holdings*, by contrast, does not address a direct challenge to the petitioning activity, the Master Settlement Agreement, nor to one of the "qualifying statutes" encouraged by the MSA to neutralize the cost disadvantage experienced by participating manufacturers as a result of its provisions. Rather, the legislation challenged in *Freedom Holdings* was enacted more than three years after the MSA was executed, two years after New York's "qualifying" statute was enacted, and was not contemplated during the negotiations that led to the MSA.

In consequence, the aspect of the Court's decision in *Freedom Holdings* pertaining to the *Noerr-Pennington* Doctrine was rather cursory, and had a completely different point and focus than the Third Circuit's decision here. The Court in *Freedom Holdings*, concerned with separate legislation, holds no more than that *Noerr-Pennington* does not insulate legislation from antitrust scrutiny simply because it resulted from lobbying activity. Pet. App. to Supp. Brf. 54a-55a. For these reasons, there is no direct conflict between *Freedom Holdings* and the Court of Appeals' decision here.

Respectfully submitted,

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